

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF
DENNIS E. GRAVES, dba
TUNE UP & LUBE KING

Appellant,

v.

STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY,

Respondent.

PCHB No. 85-183

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
ORDER

THIS MATTER, the appeal of a \$2,000 civil penalty for removing catalytic converters allegedly in violation of respondent's WAC 18-24-040, came on for hearing before the Pollution Control Hearings Board, Lawrence J. Faulk, Chairman, Gayle Rothrock, Vice Chairman, and Wick Dufford, Lawyer Member convened at Lacey, Washington on December 17, 1985. Administrative Appeals Judge William A. Harrison presided.

Appellant appeared by his attorney, Kim E. Foster. Respondent appeared by Terese Neu Richmond, Assistant Attorney General. Reporter Bibiana Carter recorded the proceedings.

1 Witnesses were sworn and testified. Exhibits were examined. From
2 testimony heard and exhibits examined, the Pollution Control Hearings
3 Board makes these

4 FINDINGS OF FACT

5 I

6 Emission control systems, known as catalytic converters, are
7 installed in modern motor vehicles by all manufacturers, under federal
8 law, for the purpose of suppressing the emission of carbon monoxide
9 into the air.

10 II

11 In 1984, the Washington State Department of Ecology (DOE) adopted
12 a program, with federal funding, to identify automotive repair shops
13 which would tamper with or remove catalytic converters from
14 automobiles.

15 III

16 As the first step of this program, an investigative unit was
17 formed within the DOE. As the second step, a written memorandum was
18 widely distributed to automotive repair shops on November 7, 1984.
19 This memorandum gave notice of three things. First, that it is
20 illegal for anyone to remove or render inoperable emission control
21 systems. Second that the same is punishable by fine. Third, that DOE
22 had established an investigative unit for state-wide anti-tampering
23 enforcement. Such a notice was sent to and received by the Appellant,
24 Dennis Eugene Graves, doing business as Tune Up and Lube King.

1 IV

2 The Department of Ecology investigative unit operates undercover.
3 That is, the members of the unit pose as ordinary citizens bringing
4 their car to a shop for repair.

5 V

6 Acting upon the allegation of a customer that appellant had
7 removed a catalytic converter, a Department of Ecology investigator
8 drove to the appellant's automotive shop on March 14, 1985. She drove
9 a 1979 Dodge Aspen determined by Department of Ecology to be, in fact,
10 in good working order both as to the engine and the catalytic
11 converter.

12 VI

13 On March 14, 1985, the Department of Ecology investigator,
14 operating under the assumed identity of one Julie Erickson from
15 Okanagan, engaged the appellant and his employee in conversation. She
16 stated that her car was running a little rough and emitted an odor of
17 sulfur or rotten eggs. This statement was pre-selected to focus
18 attention on either an untuned engine or the catalytic converter,
19 either of which could be the cause. To further focus the conversation
20 upon the catalytic converter, the Department of Ecology investigator
21 stated that she had recently had her engine tuned. Finally, the
22 Department of Ecology investigator stated that she had to return to
23 her home in Okanagon soon and could not wait if repairs could not be
24 made very soon. Therefore, it would have been difficult for appellant
25 to order and await the delivery of a new converter.

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VII

In response to these statements of the Department of Ecology investigator, appellant made no test of any kind to determine the condition of the catalytic converter. Appellant's shop contains sophisticated equipment, valued at some \$20,000, the purpose of which is to test automobile exhaust emissions. Rather, he readily recommended removal of the catalytic converter. The Department of Ecology investigator then inquired whether removal of the converter was illegal. Appellant stated that it was illegal, and cited the Department of Ecology memorandum referred to in Finding of Fact III, above. He stated, however, that he would remove the converter, would not order any new converter, would order and install a straight pipe (known as a "test tube"), and allow her to depart without any converter in place, nor any definite plan for obtaining one. In exchange for this service, appellant required her, as auto owner, to sign this notation which appellant placed on the shop's work invoice:

"We removed catalytic converter. It was plugged.
Customer will re-order new one."

The test tube was ordered and on the following day, March 15, 1985, the appellant carried out the plan just described. Appellant charged the investigator \$79.52 for this service.

VIII

On March 21, 1985, the same Department of Ecology investigator returned with another Department of Ecology investigator who drove a 1980 Toyota Corolla. Presenting the new investigator as a friend with

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1 the same problem, the statements concerning rotten egg odor and other
2 matters were made as to the Toyota. In response, appellant again made
3 no test to determine the condition of the catalytic converter.
4 Rather, he recommended the use of a cleansing liquid. The Department
5 of Ecology investigator refused on grounds that it would only
6 constitute a temporary solution, and appellant agreed. Again he
7 recommended removal of the converter, again on the condition that the
8 car owner would sign a notation placed on the invoice by appellant.
9 The notation in this instance was:

10 Catalytic converter was plugged. Removed unit and
11 had test tube put on until new one on order
arrives. Customer ordered part.

12 The appellant directed an employee to remove the converter, the
13 invoice notation was signed by the investigator, and appellant charged
14 \$93.79 for this service. The investigator was left free to depart
15 without any catalytic converter in place, or on order, and did so.

16 IX

17 There is a pointed conflict in the testimony as to whether, as
18 Department of Ecology contends, appellant knew to a certainty that
19 each car owner would never order new converter; or, as appellant
20 contends, that he believed that each owner would order a new converter
21 at some other indefinite time and place. We find that, at minimum,
22 the moment each car left the appellant's shop he possessed a keen
23 indifference as to whether it would receive a new converter.
24 Moreover, we find that the device of annotating the invoice with the
25 owner's promise to acquire a new converter originated readily and

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1 exclusively in the mind of the appellant.

2 X

3 Following the undercover investigation, Department of Ecology
4 subpoenaed appellant's repair invoices. The purpose of this action
5 was to determine whether other catalytic converters had been removed
6 using the appellant's annotation on the invoice, as in the undercover
7 investigation. No such invoices were found although the invoices, as
8 presented by appellant, showed gaps in the sequence of pre-printed,
9 serial, invoice numbers.

10 XI

11 The Department of Ecology regulation at issue provides:

12 WAC 18-24-040 STANDARDS OF MOTOR VEHICLES. No person shall remove
13 or render inoperable any devices or components of any systems on a
14 motor vehicle installed as a requirement of federal law or regulation
for the purpose of controlling air contaminant emissions, subject to
the following conditions:

15 (1) The components or parts of emission control systems on motor
16 vehicles may be disassembled or reassembled for the purpose of repair
and maintenance in proper working order.

17 (2) Components and parts of emission control systems may be
18 removed and replaced with like components and parts intended by the
manufacturer for such replacement.

19 (3) The provisions of this section (WAC 18-24-040) shall not
20 apply to salvage operations on wrecked motor vehicles when the engine
21 is so damaged that it will not be used again for the purpose of
powering a motor vehicle on a highway.

22 XII

23 The pertinent penalty provision in this matter provides, at RCW
24 70.94.31:

25 (1) In addition to or as an alternate to any other
26 penalty provided by law, any persons who violates

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1 any of the provisions of chapter 70.94 RCW or any
2 of the rules and regulations of the department or
3 the board shall incur a penalty in the form of a
4 fine in an amount not to exceed one thousand
5 dollars per day for each violation. Each such
6 violation shall be a separate and distinct offense,
7 and in case of a continuing violation, each day's
8 continuance shall be a separate and distinct
9 violation. For the purposes of this subsection,
10 the maximum daily fine imposed by a local board for
11 violations of standards by a specific emissions
12 unit is one thousand dollars.

13 (2) Further, the person is subject to a fine of up
14 to five thousand dollars to be levied by the
15 director of the department of ecology if requested
16 by the board of a local authority or if the
17 director determines that the penalty is needed for
18 effective enforcement of this chapter. A local
19 board shall not make such a request until notice of
20 violation and compliance order procedures have been
21 exhausted, if such procedures are applicable. For
22 the purposes of this subsection, the maximum daily
23 fine imposed by the department of ecology for
24 violations of standards by a specific emissions
25 unit is five thousand dollars.

26 XIII

27 Under date of August 22, 1985, Department of Ecology assessed a
civil penalty of \$2,000 against appellant, under RCW 70.94.431(1), for
two violations of WAC 18-24-040: (a) the events involving the 1979
Dodge and (b) the events involving the 1980 Toyota. From this,
appellant appeals. His notice of appeal was filed before this Board
on September 19, 1985.

28 XIV

29 Any Conclusion of Law which is deemed a Finding of Fact is hereby
30 adopted as such.

31 From these Findings of Fact the Board comes to these

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CONCLUSIONS OF LAW

I

This case involves three issues which we will address in turn: (1) whether a violation occurred, (2) whether the appellant is exculpated by the defense of entrapment, and (3) whether the amount of penalty is reasonable.

II

Violation. The Department of Ecology rule at issue, WAC 18-24-040 (text at Finding of Fact X, above) has been upheld against a challenge to its validity in Frame Factory v. Ecology, 21 Wn.App. 50, 583 P.2d 660 (1978). The court found the rule to be reasonably consistent with the purpose of the Clean Air Act, 70.94 RCW. Id. p.54. Moreover, the court emphasized that the Act's purpose is to provide air pollution prevention and control. Id. p.53. We are mindful of that purpose as we interpret the meaning of the rule's terms. We hold, first, that these catalytic converters are the type of device addressed in the rule. Secondly, that the rule's admonition that "No person shall remove..." applies not only to car owners but to all persons, including operators of auto repair shops. Thirdly, when a person removes a converter, that person violates WAC 18-24-040 where, as here, the vehicle goes back into operation before like components are installed. Nothing in the enumerated subsections of the rule authorizes operation of the vehicle. Moreover, this is the only interpretation of the rule which is consistent with the Act's purpose of air pollution control. Lastly, the Act and WAC 18-24-040

1 implementing it, impose a statutory duty upon an automotive shop owner
2 which cannot be delegated away to the owner's employees, agents or
3 contractors. The acts of such persons may be imputed to the owner.
4 See Sea Farms v. Foster & Marshall, 42 Wn.App. 308 (1985) and Tauscher
5 v. Puget Sound Power & Light Co., 96 Wn.2d 274 (1981) cited therein.
6 We conclude that appellant violated WAC 18-24-040 on the two separate
7 occasions involving the two separate cars in this matter.

8 III

9 Entrapment. The practice of undercover investigation requires
10 scrutiny to assure that it does not malfunction in ways that have been
11 identified in the criminal law system where undercover investigation
12 originated. Therefore, in cases before us involving civil undercover
13 investigation, we will allow an appellant to raise the affirmative
14 defense of entrapment. We will turn for guidance to the established
15 cases in the criminal law in applying that doctrine in our civil cases.

16 In State v. Smith, 101 Wn.2d 36, 677 P.2d 100 (1984) the elements
17 of entrapment were set out: (1) the defendant must demonstrate that
18 he was tricked or induced into committing the crime by acts of
19 trickery by law enforcement agents and (2) he must demonstrate that he
20 would not otherwise have committed the crime. In our cases, the
21 burden of proving these two elements is upon the appellant. See State
22 v. Ziegler, 19 Wn.App. 119, 575 P.2d 723 (1978).

23 In this case, appellant has not proven the first of these
24 elements. The statements of the Department of Ecology investigators
25 were pre-selected, as we have found, to focus attention upon the

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1 catalytic converter. In stating that there were difficulties which
2 would inhibit ordering a new converter through appellant's shop, the
3 DOE investigators circumscribed appellant's options to some degree.
4 However, the sum of these statements did not exceed the "normal amount
5 of persuasion" which under Smith, supra, does not constitute
6 entrapment. When presented with an opportunity to violate WAC
7 18-24-040 appellant readily did so. We conclude that appellant was
8 not entrapped in this matter, and is not thereby exculpated from these
9 violations.

10 IV

11 Amount of Penalty. The penalty imposed by Department of Ecology
12 under RCW 70.94.431(1) in this case is the maximum under that section
13 for each of the two violations. However, the \$1,000 for each
14 violation, total \$2,000, is considerably less than the maximum
15 penalty. That is due to RCW 70.94.431(2) which, in proper
16 circumstances, would allow \$5,000 per incident, total \$10,000.

17 As to the \$2,000 civil penalty assessed by Department of Ecology,
18 we note the following. First, appellant was on notice of the
19 illegality of removing the converters through Department of Ecology's
20 memorandum received shortly before these incidents. Second, appellant
21 operates as a commercial enterprise, and charged a fee for removing
22 the converters. Third, appellant is an experienced automotive repair
23 professional whose shop is fully equipped for emission testing, yet he
24 removed the converters without making any objective test of them.
25 Fourth, appellant took affirmative steps after each removal to

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1 "protect himself" by notations upon the invoices while exhibiting
2 little concern for the substantive fact that emissions from the cars
3 would be uncontrolled, indefinitely, due to his actions.

4 We apply a three-part test in evaluating the reasonableness of an
5 assessed penalty: The factors are: (1) the severity of the
6 violation, (2) the violator's prior record, and (3) the violators
7 behavior since the penalty was issued. Puget Chemco v. PSAPCA, PCHB
8 No. 84-245 (1985). In this case, little or no compelling evidence was
9 offered under the second and third elements of our test. The factors
10 which we enumerate above, however, establish that the severity of this
11 violation was substantial. The \$2,000 civil penalty was justified and
12 reasonable.

13 v.

14 Any Finding of Fact which is deemed a Conclusion of Law is hereby
15 adopted as such.

16 From these Conclusions of Law the Board enters this
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ORDER

The violation and \$2,000 civil penalty are affirmed.

DONE at Lacey, Washington this 24th day of February, 1986.

POLLUTION CONTROL HEARINGS BOARD

See Dissenting Opinion
LAWRENCE J. FAULK, Chairman

Gayle Rothrock
GAYLE ROTHROCK, Vice Chairman

Wick Dufford
WICK DUFFORD, Lawyer Member

William A. Harrison
WILLIAM A. HARRISON
Administrative Appeals Judge

1 LAWRENCE J. FAULK -- DISSENTING OPINION

2

3 I write separately because I believe the result reached by the
4 majority is unreasonable, unjust to this citizen, establishes a
5 precedent that is untenable and certainly not required by the law.

6 In this case, we have a citizen being fined \$2,000 for removing
7 two catalytic converters. It seems to me that this citizen was
8 entrapped by the Department of Ecology agents, and I do not think that
9 this kind of a procedure traditionally applied to the criminal arena
10 should be extended to civil matters.

11 Establishing entrapment involves making the factual determination
12 that; (1) government officials induced the appellant to commit the
13 act; and (2) the appellant lacked the predisposition to commit the act.
14 Here there was some evidence to support the DOE position that the
15 appellant had the predisposition to commit the alleged illegal act.
16 However it is also true that the state, by eliminating possible
17 alternatives that might have caused the catalytic converter to
18 malfunction led the appellant to the converter.

19 The evidence in this case, and the inferences which may be drawn
20 therefrom, create an issue of fact; namely, whether the DOE official's
21 conduct constituted undue solicitation inducing the appellant to
22 remove the converter. "Undue solicitation" is the standard for
23 establishing entrapment. State v. Swain, 10 Wn.App. 885, 520 P.2d 950
24 (1974).

25 Lets examine the testimony of the undercover agents of Department
26 Dissenting Opinion--Faulk
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1 of Ecology. Both women testified that they provided the appellant
2 with the information that their particular car had just received a
3 complete diagnostic tune-up and that there was nothing wrong with the
4 engine but the car was emitting an extremely noxious sulfur odor.
5 Both women stated that their car engines had been tuned recently. In
6 addition, Ms. Stetler specifically rejected appellant's suggestion
7 that she try a cleansing liquid on her converter which the appellant
8 suggested as an alternative to removing the converter.

9 Ms. Stetler testified that she had tried such a liquid before and
10 that it didn't work. In addition, Ms. Burton testified that she
11 deliberately lied to the appellant in telling him that she lived in
12 Okanogan, Washington. Because of this, she explained she was unable
13 to bring her car back to him for replacement of the converter but that
14 she would sign an agreement indicating that she would replace it when
15 she got back to eastern Washington.

16 The appellant informed the under cover agents from Department of
17 Ecology that they would have to sign the work orders as indicated
18 above in order to protect him in the event they failed to install the
19 converter or were stopped prior to having it reinstalled. Mr. Graves
20 was quite candid when he explained that such a disclaimer would
21 absolve him from liability until such time as they had their
22 automobiles properly repaired.

23 Mr. Graves testified that except for the representation and
24 prodding of the two under cover agents, he would never have removed
25 the catalytic converters from the vehicles because he would have first

1 performed a diagnostic tune-up which would have indicated that the
2 catalytic converters were in good working condition and that the only
3 problem with the vehicles was a mistuned engine. In effect, the
4 undercover agents took away every option that Mr. Graves would have
5 usually used and forced him into removing the converters rather than
6 allowing him to make the usual diagnosis that he would otherwise have
7 performed on a regular customer. In the final analysis, the
8 activities of the under cover agents foreclosed any other opportunity
9 to Mr. Graves but the removal of the converter.

10 On the record before us, I would conclude that assessing a penalty
11 against Mr. Graves is not justified.

12 In the broader view, I note with deep concern that undercover
13 sting operations are being extended to civil cases. The record of
14 appeals before this Board indicates that from the time of its
15 inception until now the respondent has refrained from operating
16 undercover operations whose only purpose is to deceive people into
17 committing an illegal act. Though not mentioned as such, undercover
18 operations have traditionally been applied to the criminal area, and
19 not to environmental enforcement.

20 If the Agency believes that the time has come to commence
21 undercover operations concerning environmental enforcement, this
22 abrupt change in policy by which environmental laws are enforced by
23 entrapping citizens is not the way to proceed. Rather, a period of
24 public notice should precede this policy change and it should be
25 adopted by the Legislature. In addition, the department should adopt

1 rules specifically addressing undercover environmental enforcement to
2 determine ways and means of protecting citizens from this abuse of
3 authority.

4 The Legislature will be disappointed to learn that in enacting the
5 Clean Air Act and subsequent amendments, it was allowing a government
6 agency to fine people by entrapping them and inducing them to commit an
7 act. And I think its disappointment will continue unabated when it
8 discovers that the majority of this Board has upheld the penalty. The
9 policy of undercover operations concerning environmental enforcement
10 is an appropriate matter for consideration by the Legislature.

11 Finally, one has to ask what is the result of this decision. In
12 my view, this Board has given a license to the Department of Ecology
13 to fine people for air pollution violations by conducting undercover
14 operations. It doesn't make any sense to me.

15 The public interest would be better served if efforts to control
16 the removal of catalytic converters were accomplished by traditional
17 enforcement practices and information complaints rather than by
18 undercover sting operations.

19 In any event, it is our job to interpret and apply the statutes in
20 a manner that further justice. I believe the greater justice is
21 accomplished by finding for the appellant.

22 Therefore, I would find that a technical violation of the Clean
23 Air Act has occurred and vacate the penalties, because Department of
24 Ecology should not be utilizing undercover operations in the
25 enforcement of environmental laws.

26  2/24/86
27 LAWRENCE J. FAULK, Chairman